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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHANE AUSTIN PETERS,

Defendant and Appellant.

A131097

(Solano County

Super. Ct. No. VCR208166)

THE PEOPLE,

Plaintiff and Respondent,

v.

DALE JOSEPH EVERET COLEY,

Defendant and Appellant.

A132226

(Solano County

Super Ct. No. VCR208165)

ORDER MODIFYING OPINION

[NO CHANGE IN JUDGMENT]

BY THE COURT:

The opinion filed January 4, 2013, is modified as follows: In the second paragraph on page 7, the sentence that reads “The murder weapon was never found, although a different semiautomatic handgun was seized by police when they arrested Peters and searched his home” is deleted. The following sentence is inserted in its place: “The murder weapon was never found, although a different semiautomatic handgun was seized by police when they arrested Coley and searched his home.”

The modification does not affect the judgment.

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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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Appellants Dale Joseph Evert Coley and Shane Austin Peters were jointly tried before a jury and convicted of second degree murder and attempted murder with true findings on related firearm and gang allegations. (Pen. Code, §§187, 664/187, 12022.53, 186.22.)¹ Both appellants argue that the findings on the gang allegations were not supported by substantial evidence; that the trial court should have granted a motion to reveal the identity of confidential informants who supplied information to the prosecution's gang expert; that the failure to order disclosure of the informants' identities violated their right to confront witnesses; and that the court should have ordered the

¹ Further statutory references are to the Penal Code unless otherwise indicated.

identity of the jurors disclosed under Code of Civil Procedure sections 206 and 237. Appellant Coley additionally argues that the court should have granted the motion for self-representation he made at his sentencing hearing; that he is entitled to additional presentence credits; and that the cumulative effect of various errors deprived him of a fair trial. Appellant Peters argues that he was subjected to multiple punishment for the finding on the gang allegation, contrary to section 654. We affirm.²

BACKGROUND

On the evening of January 28, 2009, 15-year-old Emmanuel Hernandez was walking along Sonoma Boulevard in Vallejo with his friend Yusef Hussein and some other people. Hussein and Hernandez separated from the others and continued walking. At about 8:15 p.m., after they passed an auto parts store, Hussein heard a series of gunshots and ran, diving over a guardrail. When he rose from the ground uninjured, he found Hernandez bleeding and slumped over the rail. An officer who was patrolling nearby had heard a rapid succession of gunshots and responded to find Hernandez bleeding from his throat and mouth. Hernandez had been shot in the back of his neck and later died of his wound.

Eight expelled bullet casings from a nine-millimeter semiautomatic handgun were found in the street at the site of the shooting. A neighbor in the area who looked out his window immediately after hearing the shots saw a small green car leaving the area of the shooting. A video tape from the auto parts store's surveillance camera showed that at about the time of the shooting, two people were walking on the sidewalk. It also showed that a vehicle, which could not be identified, stopped at and then ran a red light at the intersection of Sonoma Boulevard and Nebraska Street.

Hussein told police that he had seen a green car and recognized the driver. He did not initially identify appellant Coley when he was shown photographic lineups containing

² Appellants also filed petitions for writs of habeas corpus alleging newly discovered evidence and ineffective assistance of counsel. By separate order filed the same date as this opinion, we have issued an order to show cause returnable in the superior court. (Consolidated case no. A137025.)

Coley's picture. After a detective angrily confronted Hussein about a photo of Coley from the "My Space" website that had been circulated as a "wanted poster" seeking the driver of the car involved in the Hernandez shooting, Hussein identified Coley from a photocopy of his driver's license. Hussein wrote "NVS" on the driver's license picture. Hussein had been in schoolyard fights with "[t]he Norteno," gang and people could have perceived him as a member or associate of the rival Sureno gang at the time.³

Appellants Coley and Peters were charged with the first degree murder of Hernandez and the attempted murder of Hussein. (Pen. Code, § 187, 664/187.) The murder charge was accompanied by special circumstance allegations that the killing was gang-related and was perpetrated from a vehicle, and both counts included firearm and gang allegations. (§§ 190.2, subds. (a)(21) & (a)(22), 12022.53, subds. (b), (c), (d) & (e)(1); 12022.5, subd. (a)(1), 186.22, subds. (b)(1), (f).) Appellants were jointly tried before a jury.

At the trial, the description of the shooting came primarily from Richard Eads and Francisco Soto, who were originally charged with the murder but agreed to cooperate with the investigation in exchange for the opportunity to plead guilty to the lesser crime of accessory after the fact. Both identified Coley and Peters as friends, and testified that they were in Coley's car with Coley, Peters, and (according to Eads) Alonzo Wilson when the shooting took place. DNA evidence consistent with both Eads and Soto was in fact found in Coley's car.

According to Eads, he saw Coley and Peters almost every day. He had heard both of them refer to a gang called "NVS," which stood for North Vallejo Savages and was a Norteno gang. Coley's gang moniker was "Slumpa" and Peters's was "Frosty." Eads had been with Coley and Peters when they drove around flashing gang signs and yelling at rival gang members, an activity they called "scrap hunting," "scrap" being a

³ When he testified at trial, Hussein denied that he and Hernandez were gang members, but he allowed that some people might think they were. He claimed he did not see or hear a car before or after the shooting and never saw the driver. He acknowledged he was scared to testify.

derogatory term that Nortenos used to refer to Surenos. On one of these “hunts,” Eads saw Peters fire a gun in the air when they came across a group of Surenos.

On the day Hernandez was shot, Coley, Peters, Eads and Soto had been hanging out together with Alonzo Wilson, smoking marijuana. In the early evening, Eads, Coley and Wilson went to a Wal-Mart with a young woman to buy spray paint.⁴ Coley, Peters, Eads, Soto and Wilson began driving around in Coley’s car, stopping to spray paint anti-Sureno graffiti. They drove to a park in West Vallejo, where they knew Sureno gang members were likely to be present. Coley was driving and Peters was sitting in the front passenger seat, with the others sitting in the back seat.

While driving down Sonoma Boulevard, Peters and Coley noted a “rival gang member” named “Yusef” (Hussein) walking down the sidewalk with some other people. Coley said something to the effect of, “I can’t believe he [is] walking around on my streets.” Eads knew that Hussein was a rival gang member from his name. Coley drove Peters to his car, where Peters retrieved something, and they drove back to the area where they had seen Hussein. When they spotted him again, Coley slowed down and Peters got out of the car, but he returned without doing anything. Coley made a U-turn, ran a red light at the intersection of Sonoma Boulevard and Nebraska Street and crossed over onto the opposite side of the street to get closer to Hussein. Peters leaned out the open passenger side window, sat on the door frame (where the window rolled up and down) with his feet on the passenger seat, and Eads heard several shots. As they drove away, Eads saw a person kneeling down with his hand on the cement like he was trying to hold himself up.

The group returned to Coley’s house, where they searched the car for bullet shells. They drove back to Peters’s car, and Eads and Peters drove together to Eads’s house. Eads heard Peters speaking on his phone saying “shots, fired, shots fired.” He also said, “I got my stripes now,” or “I’m definitely getting my stripes now.” Peters later told Eads he had gotten rid of the gun used in the shooting and that Emmanuel Hernandez, the

⁴ Coley, Eads, Wilson and a young woman were captured on a Wal-Mart video camera buying spray paint at about 6:45 p.m.

person who was killed, was a Sureno gang member known as “Little Creeps.” Sometime after the shooting, Peters told Eads that he and Coley had had an encounter with a rival gang member in which he yelled, “Rest in piss, Little Creeps” out the car window.

Soto described the shooting in much the same way. He testified that after a day of smoking marijuana, Coley, Peters, Eads and Soto were driving around in Coley’s car, with Coley driving and Peters in the front passenger seat. While on Sonoma Boulevard, they saw a BBH (Brown Brotherhood) Sureno gang member who Peters identified as “Yusef” (Hussein) walking down the street. Peters told Coley that Hussein was a rival gang member and Coley pulled off on one of the side streets. Peters got out of the car and walked toward Hussein with a gun in his hand, but then returned to the car.⁵ Coley started driving again and Peters leaned out the passenger side window, sat on the door frame, and fired some shots. They drove to Coley’s house and searched the car for shells. Soto heard Peters say, “We just laid him down.”

Records of Peters’s cell phone usage show that on the afternoon and evening of the shooting, whoever was using that phone was moving around the City of Vallejo. At 4:40 p.m. a call was placed from Peters’s cell phone from a location in Vallejo to his mother’s telephone. Four more calls were made from his phone in Vallejo that evening, and incoming calls to his phone went unanswered between 8:00 p.m. and 8:13 p.m. At 8:23 p.m., there was a call from Peters’s phone to his home number, and at 8:26 p.m., Peters’s phone received a call from his mother’s cell phone. A call from Peter’s cell phone back to his mother’s number connected at 8:28 p.m.

A text message sent by Peters’ cell phone about three hours after the shooting stated, “im sellin dat ruger.” The following text messages were exchanged between Coley’s telephone number and Peters’s later that same night: “U home?” “Yup was dat shit on the news.” “I didn’t c it bt I missed half of it.” “Yup, I ain’t heard nutin eitha.” In the days following the shooting a text exchange between Peters’s phone and another number appeared to refer to the trade or sale of a handgun, which is sometimes referred

⁵ Soto thought the gun was a revolver.

to in street parlance as a “thang”: “[Other number]: You grimy u hit dat nigga an den trade me dat thang is hot u shadey. [Peters’s phone]: Don’t tex me at work [Other number]: Cus what u mean [Peters’s phone]: It ain’t hot bruh don’t text shit like dat cuz da fed.”

Detective Tribble of the Vallejo Police Department had been assigned to the FBI Solano County violent gang task force and had monitored gang activity within Solano County since October 2007. He had testified as a gang expert on 25 occasions and was familiar with the Norteno and Sureno gangs. The “primary activities” of the Nortenos include criminal activities such as murder, robbery, assault with a deadly weapon, drug sales, witness intimidation, firearm possession and shooting from a vehicle. Tribble arrested Norteno member Randy Valencia in 2006, who was convicted of assault with a firearm, and Norteno member Dominic Tenorio in 2007, who was convicted of robbery.

According to Detective Tribble, various subsets of the Nortenos operate in Vallejo, one of which is the North Vallejo Savages or NVS. NVS and other subsets operate under the umbrella of the larger Nortenos organization, engage in some common criminal activities, and are all enemies of the Sureno gang. NVS had about seven to 10 members, associated itself with the color red and the number 14 (Norteno symbols) and operated throughout the city of Vallejo. Tribble had first seen graffiti bearing the initials “NVS” in 2008; a fellow officer told him it was a new subset of Nortenos that had emerged within the past year or so.

In Tribble’s opinion, appellant Coley was a member of NVS, a subset of the Nortenos. He based this opinion on Coley’s association with Peters, Eads, Soto, and other Norteno members; his possession of rap lyrics that appeared to be gang writings; and photos showing him throwing gang signs and wearing red clothing that appeared to be gang attire. Tribble believed appellant Peters was also a member of NVS because he associated with Norteno/NVS members, wore gang clothing and had a gang moniker of “Frosty.” In 2010, after the shooting in this case, NVS member Roy Brown was arrested for a crime involving a gun. Both appellants associated with Brown.

Appellant Peters offered an alibi defense at trial, with his mother, uncle, sister and a neighbor testifying that he was at his mother's home on the night of the shooting. To explain various references to NVS, he presented the testimony of friends who reported that he used a laptop in Coley's garage to create songs and referred to the garage as NVS Studios, short for North Vallejo Studios. Peters also presented the testimony of two homeless men who were living close to the scene of the shooting. One of them claimed not to have heard any vehicles when the shots were fired. The other testified that he heard people yelling profanities in Spanish and saw a man walking fast and holding a weapon after the shooting; he described the man as 6 feet 3 inches, stocky, with his face hidden by a hood.

The murder weapon was never found, although a different semiautomatic handgun was seized by police when they arrested Peters and searched his home. No gunshot residue was found in Coley's car.

The jury convicted Coley and Peters of second degree murder and attempted murder. As to Coley, the jurors returned true findings on the gang allegations under section 186.22, subdivision (b) that were attached to each count, as well as the firearm enhancement that was alleged as to the murder count under section 12022.53, subdivisions (d) and (e)(1). As to Peters, the jury found true the gang allegations under section 186.22, subdivision (b), but was unable to reach a verdict on the allegations that he had personally discharged a firearm causing great bodily injury or death under section 12022.53.

The court sentenced Coley to prison for 15 years to life on the murder count plus 25 years to life for the firearm enhancement, for a total term of 40 years to life, with a concurrent sentence on the attempted murder count. Peters was sentenced to 15 years to life on the murder count and was ordered to serve a consecutive nine-year upper term on the attempted murder count, plus an additional 10 years for the gang enhancement attached to the attempted murder count, for a total term of 19 years plus 15 years to life.

DISCUSSION

I.

Sufficiency of the Evidence—Gang Allegations

The jury returned true findings on the gang allegations under section 186.22, subdivision (b)(1), which at the time of the crime in 2009, applied to “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” Appellants argue that the prosecution failed to prove the existence of a criminal street gang. We disagree.⁶

When assessing the sufficiency of the evidence to support a finding under section 186.22, subdivision (b), “ ‘we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]’ [Citation.] We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. [Citation.] Reversal is unwarranted unless ‘ ‘ ‘upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ’ ’ [Citation.]” (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56; see also *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

For the purposes of section 186.22, subdivision (b), a “criminal street gang” is “an ongoing organization, association, or group of three or more persons, whether formal or

⁶ The true findings on the gang allegations had the following effect on appellants’ sentences: Appellant Peters was ordered to serve 15 calendar years for the murder count under section 186.22, subdivision (b)(5), which provides that “any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.” Peters also received a 10-year enhancement on the attempted murder count pursuant to section 186.22, subdivision (b)(1)(C), which provides, “If the felony is a violent felony, as defined in subdivision (c) of section 667.5, the person shall be punished by an additional term of 10 years.” Appellant Coley’s sentence included a 25-year-to-life firearm enhancement under section 12022.53, subdivision (d) and (e)(1), for which a true finding under section 186.22 was a necessary element.

informal, having as one of its primary activities the commission of one or more [enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (f).) “The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) A “pattern of criminal gang activity” requires a showing of two or more enumerated crimes committed on separate occasions, or by two or more persons, within the statutorily defined period (the so-called “predicate offenses”). (§ 186.22, subd. (e); *People v. Ortega* (2006) 145 Cal.App.4th 1344, 1355 (*Ortega*).)

Detective Tribble, a qualified gang expert, testified that the Nortenos were one of three main Hispanic street gangs in the state, the others being the Surenos and Brown Pride. The Nortenos identified with common signs and symbols such as the number 14 and the color red, and were rivals and enemies of the Sureno gang. Norteno gang members thrived on fear and intimidation and members earned status within the gang by “putting in work” or committing criminal acts that promoted their gang and their status in the gang community. A primary activity of the Nortenos was the commission of violent crimes such as murder, robbery, assault with a deadly weapon, witness intimidation, firearm possession, shooting from a vehicle, and drug sales. Given this evidence, the Nortenos clearly qualified as a criminal street gang under section 186.22. (See *Ortega*, *supra*, 145 Cal.App.4th at p. 1356; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207.)

We reject appellant Peters’s claim that the prosecution failed to prove the Nortenos had three or more members as required by the statute. Though he may not have placed a precise number on Norteno membership, Detective Tribble testified that the Nortenos were one of the three main Hispanic gangs in the state, and that there were several subsets of the Nortenos in Vallejo alone (the Centro Vallejo Cliqua, the Barrio Centro Vallejo, the Northern Organized Raza, the North Side Locos, the Frisco Killin’ Riders, and NVS). Moreover, he testified that NVS, a Norteno subset, had seven to ten

members. From this testimony it can be readily inferred that the Norteno gang has more than three members.

Appellants argue that the jury was required to find that NVS, not simply the Nortenos, qualified as a criminal street gang under the statute. We disagree. Evidence of gang activity and culture need not be specific to a particular local street gang, but may be based on a larger organization. (*People v. Williams* (2008) 167 Cal.App.4th 983, 987 (*Williams*). While having a similar name or a shared ideology is not sufficient to allow the status and deeds of a larger group to be ascribed to a smaller group, multiple units can be treated as a whole when “some sort of collaborative activities or collective organizational structure” can be inferred from the evidence. (*Id.* at p. 988.) Thus, in *Ortega, supra*, 145 Cal.App.4th at pp. 1356-1357, the court rejected the assertion that the prosecution had to prove precisely which Norteno subset was involved in the case when there was sufficient evidence that Norteno was a criminal street gang, and “[n]o evidence indicated the goals and activities of a particular subset were not shared by the others.” (See also *In re Jose P.* (2003) 106 Cal.App.4th 458, 463 [evidence sufficient where gang expert testified that Norteno street gang was an ongoing organization having 600 members and associates in the Salinas area; that there were separate cliques or factions within the larger gang; and that the two gangs at issue in the case were Norteno subgroups loyal to one another and to the larger Norteno gang].)

The evidence showed that appellants were members of the NVS subset of the Norteno gang, that they brandished the Norteno symbols (red clothing, the number 14), and that they targeted Sureños, which “increases the Norteno criminal street gang stature and reputation.” NVS, like other Norteno subsets in Vallejo, were under the “umbrella” of the Nortenos, identified as Nortenos, maintained enmity with Sureño groups, and “all have a certain level of criminal activity in common.” As in *Ortega*, “[n]o evidence indicated the goals and activities of a particular subset were not shared by the others.” (*Ortega, supra*, 145 Cal.App.4th at p. 1357.)

Appellant Coley suggests that there was no substantial evidence of the “primary activities” element of section 186.22, subdivision (b) because Detective Tribble’s

testimony on that point was “conclusory.” He relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*), in which the gang expert testified in the following manner about an alleged street gang known Varrio Viejo: “I know they’ve committed quite a few assaults with a deadly weapon, several assaults. I know they’ve been involved in murders. [¶] I know they’ve been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.” (*Id.* at p. 611.)

The problem in *Alexander L.* was that the expert’s conclusory statement was the sum total of the evidence regarding the primary activities of the gang. (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 611.) The appellate court concluded that absent additional information about how the expert had come to “know” this information, the testimony was insufficient to meet the primary activities element. (*Id.* at p. 612.) Here, by contrast, Detective Tribble testified that he had worked as a gang investigator for the City of Vallejo, was cross-designated as a federal officer with the Solano County violent gang task force, had received extensive specialized training in gangs, had met with gang investigators from different jurisdictions, had made daily contact with gang members, had personally investigated over 100 gang crimes, and had qualified as a gang expert on 25 previous occasions, five of which involved Norteno gangs. His opinion was sufficiently founded on a number of sources and did not suffer from the same defect as the opinion in *Alexander L.* (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 949.)

II.

Denial of Disclosure of Informants’ Identity

Appellants argue that the trial court should have ordered the prosecution to disclose the identities of confidential informants relied upon by Detective Tribble in forming his opinions regarding gang activity and membership in the Vallejo area. We disagree.

A. General Legal Principles

The government has a privilege to refuse to disclose the identity of a person who has furnished information to the police concerning the commission of crimes. (Evid. Code, § 1041.) The privilege is founded on the recognition that informants lose access to

crime-prevention information when their identities are known publicly and risk reprisal from those they incriminate. (*People v. Hobbs* (1994) 7 Cal.4th 948, 957-958.) This privilege is not absolute and must be balanced against a criminal defendant's right to a fair trial. (*People v. Garcia* (1967) 67 Cal.2d 830, 843.)

When an informant is a material witness in the case, the prosecution must disclose that person's identity or suffer dismissal of the charges. (*People v. Lawley* (2002) 27 Cal.4th 102, 159 (*Lawley*).) "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant." (*Lawley*, at p. 159.) A defendant seeking disclosure has the burden of producing "some evidence" to establish materiality. (*Ibid.*) The showing " 'must rise above the level of *sheer* or *unreasonable speculation*, and reach at least the low plateau of reasonable possibility.' " (*People v. Luera* (2001) 86 Cal.App.4th 513, 526.)

Evidence Code section 1042, subdivision (d) establishes the procedure for seeking disclosure of an informant's identity. The trial court must determine whether "the informant is a material witness on the issue of guilt" and can hold an in camera hearing to determine "whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (*Ibid.*) On appeal, the ruling is reviewed for abuse of discretion. (See *People v. Alderou* (1987) 191 Cal.App.3d 1074, 1080; see *People v. Haider* (1995) 34 Cal.App.4th 661, 669.)

B. Procedural Background

In forming his opinions regarding gang activities in Vallejo, Detective Tribble relied in part on information provided by five confidential informants who were gang members or associates in the Vallejo area. At the preliminary hearing and in a set of notes provided to the defense, Tribble described the informants as follows: (1) a person who claimed association with members of the Central Valley Clique and the Barrio Central Vallejo (two Norteno subsets in Vallejo), and who knew that appellant Peters and Jeremy Molina (known as "Worm") were founders of NVS and that NVS sold drugs; (2) three Sureno gang members who had no information about who started NVS or its

membership, but who knew that NVS stood for North Vallejo Savages and that NVS interacted with CVC (Centro Vallejo Clique); and (3) a validated member of BBH (Brown Brotherhood), a Sureno subset, who told Tribble he went to school with an NVS member known as “Worm.” None of the five informants were percipient witnesses to the charged crimes or had spoken to appellants.

After cross-examining Detective Tribble at the preliminary hearing, appellants asked the court to order the disclosure of the informants’ identities. Tribble asserted that their identifying information was privileged under Evidence Code sections 1040 through 1042. The court conducted an in camera hearing on the issue, pursuant to Evidence Code section 1042, subdivision (d), and denied the request for disclosure.

Before trial commenced, appellants brought motions to disclose the identities of these informants under Evidence Code section 1042, subdivision (d). Appellant Peters also filed a motion in limine seeking the same information, or, alternatively, an order precluding expert testimony that was based on information provided by the informants. After conducting a second in camera hearing on the issue, the court ordered the prosecution to disclose a redacted gang debriefing form filled out by the first informant, but ordered that the informants’ identities would remain confidential. The court indicted that Detective Tribble could base his expert opinion on information provided by the informants, but could not convey the details of what they had told him on cross-examination. It observed that while the identities of the informants had not been disclosed, appellants knew the substance of the information they provided from the cross-examination of Detective Tribble at the preliminary hearing. The court admonished the jury to consider the out-of-court statements of other people to Detective Tribble as an explanation for his expert opinion, but not for the truth of those statements.

B. Discussion

Appellants and the People have requested that we review the transcripts of the in camera hearings to determine whether the five informants were material witnesses whose identities should have been disclosed. (See *Lawley, supra*, 27 Cal.4th at p. 160; *Hobbs, supra*, 7 Cal.4th at p. 971.) Having done, so, we find no abuse of discretion. The five

informants at issue were gang members who provided Tribble with background information regarding the existence of NVS as a subset of the Nortenos, but none of them had information about the shooting in this case. They did not qualify as material witnesses because no showing was made that they could have provided any information tending to exonerate appellants. (See *Lawley*, at p. 159.) Nothing in the sealed transcripts suggests otherwise.

Appellants argue that they were deprived of their right to cross-examine witnesses under Evidence Code section 721, subdivision (a), which provides that “a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications; (2) the subject to which his or her expert testimony relates; and (3) the matter upon which his or her expert opinion is based and the reasons for his or her opinion.” They also claim a violation of Evidence Code section 804, subdivision (a), which provides, “If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.”

The court’s order did not violate these statutory provisions. Appellants were not prevented from cross-examining Detective Tribble about the matters on which his opinion was based as allowed by Evidence Code section 721, subdivision (a); only information that would have identified the informants was off limits. And Evidence Code section 804, subdivision (a) does not, as appellants suggest, entitle a defendant to call any particular person as a witness. Rather, it governs the manner of direct examination when a person who testifies has also made a statement relied upon by the opposing party’s expert. (*People v. Ledesma* (2006) 39 Cal.4th 641, 701.) Evidence Code section 804, subdivision (d) specifically provides, “An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.” The privilege under Evidence Code section 1041 would be meaningless if the statutory right to cross-examine an expert witness were construed to mandate the disclosure of an

informant's identity after the trial court had correctly ruled that the witness was not material.

Appellants complain that because they did not know the identify of the five informants and could not cross-examine them at trial, they were deprived of their Sixth Amendment right to confront the witnesses against them. Although recognizing that California law has historically allowed experts to testify to out-of-court statements for the non-hearsay purpose of explaining the basis of their opinions (*People v. Gardeley* (1996) 14 Cal.4th 605, 618), they argue that this practice is no longer tenable in light of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). We disagree.

The Sixth Amendment's confrontation clause states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him . . ." (U.S. Const., 6th Amend.) In *Crawford, supra*, 541 U.S. at p. 54 the court held that any "testimonial" statement that is offered for its truth is barred by the confrontation clause unless the declarant is unavailable to testify at trial and the defendant has had a prior opportunity to examine the declarant. (See also *Davis v. Washington* (2006) 547 U.S. 813, 821.) Although the nature of a "testimonial" statement was not comprehensively defined in *Crawford*, several principles should guide a court in determining whether a statement meets that definition: "First . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth,

statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.” (*People v. Cage* (2007) 40 Cal.4th 965, 984.)

Detective Tribble did not relay statements by any of the five informants to the jury. And, even if such statements could be implied from the content of his opinion, it appears that most of them would not qualify as “testimonial.” Though statements were made by gang members to the detective, our review of his testimony at the in camera hearings suggests that only one informant provided statements during the course of an (unrelated) formal investigation, as opposed to an informal interview.

To the extent Detective Tribble might have considered testimonial statements by the informants in forming his opinion, the confrontation clause is not implicated because those statements were not offered for their truth. “ ‘*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert’s opinion. *Crawford* itself states that the confrontation clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” ’ ” (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427, citing *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210; see also *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154.) The limiting instruction given in this case directed the jury to consider the statements relayed by Tribble as a basis for his opinion, and not for their truth.⁷

⁷ In *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127-1131 (*Hill*), a different panel of this court critiqued the distinction made in *Thomas*, *supra*, 130 Cal.App.4th 1202 between out-of-court statements offered for their truth and those relied upon by an expert as the basis for his or her opinion. The panel noted that “where basis evidence constitutes an out-of-court statement, the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert’s opinion.”

Nor do we agree that appellants were deprived of their rights under the confrontation clause as a result of the “limitation” placed on their cross-examination of Detective Tribble. As a result of the court’s ruling on the motion to disclose the informants’ identities, the statements made by those informants were not conveyed to the jury by the detective during direct examination. But the court specifically stated, “[T]he defendants are free to cross-examine him about that, so then that puts the ball back in your court as to whether or not you wish to cross-examine him about that information” Thus, the only restriction placed on the appellants’ cross-examination was their ability to elicit information identifying the five informants. This restriction, which was authorized under this state’s evidentiary law regarding confidential informants, did not amount to a violation of the federal Constitution. (See *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1018.)

III.

Denial of Petition for Disclosure of Juror Contact Information

Prior to sentencing, trial counsel for appellant Peters filed a “Petition for Release of Juror Identifying Information” so that he could investigate a motion for new trial. Appellant Coley joined in the petition, which was denied by the court based on a lack of good cause. Appellants argue that the denial of the petition requires reversal of the judgment or, alternatively, a remand to allow the disclosure of the information and the preparation of a motion for new trial. We disagree.

A. Applicable Law

Following a jury verdict in a criminal proceeding, the court’s record of juror information is “sealed,” meaning all “personal juror identifying information of trial

(*Hill*, at p. 1131.) *Hill* concluded, nonetheless, that the distinction between basis evidence and substantive evidence was dictated by *Gardeley*, *supra*, 14 Cal.4th 605 and other Supreme Court precedents. (*Hill*, at p. 1127, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) It therefore rejected the defendant’s claim that the gang expert should not have been permitted to describe the out-of-court statements supporting his opinion during his testimony before the jury. (*Hill*, at pp. 1127-1128.) We likewise follow *Gardeley* and apply its distinction between basis evidence and hearsay evidence offered for its truth.

jurors. . . consisting of names, addresses, and telephone numbers,” is extracted or otherwise removed from the court record. (Code Civ. Proc., § 237, subds. (a)(2)–(3).) Code of Civil Procedure section 206, subdivision (g), allows a defendant to petition the court for access to juror-identifying information “for the purpose of developing a motion for new trial.” Code of Civil Procedure section 237, subdivision (b) provides, “The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror’s personal identifying information.” The procedure for obtaining juror contact information set forth in Code of Civil Procedure sections 206 and 237 is designed “to balance the interests of providing access to identifying juror information for a particular, identifiable purpose against the interests in protecting the jurors’ privacy, safety, and well-being, as well as the interest in maintaining public confidence and willingness to participate in the jury system.” (Stats. 1995, ch. 964, § 1, p. 7375.)

A defendant’s petition for disclosure of juror identifying information must be “accompanied by a sufficient showing to support a reasonable belief jury misconduct occurred. . . .” (*People v. Wilson* (1996) 43 Cal.App.4th 839, 850 (*Wilson*)). The statutes are not designed to allow fishing expeditions for information; rather, good cause for disclosure must be affirmatively established. (*Id.* at p. 852.) “Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interest in the integrity of our jury system and a juror’s right to privacy outweigh the countervailing public interest served by disclosure of the juror information. . . .” (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552; see *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1093-1095 (*Townsel*); *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.)

When evaluating whether a defendant has made a prima facie showing of juror misconduct under Code of Civil Procedure section 237, we bear in mind that such misconduct may only be proven by “overt acts or statements that are objectively ascertainable by sight, hearing, or the other senses. (*People v. Danks* (2004) 32 Cal.4th 269, 302, []; Evid. Code, § 1150, subd. (a).) No evidence may be presented concerning the subjective reasoning processes of a juror that can neither be corroborated nor

disproved; rather, the effect of any misconduct is evaluated based on an objective standard of whether there is a substantial likelihood of juror bias.” (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116; see also *In re Hamilton* (1999) 20 Cal.4th 273, 294.)

We review an order denying a petition under section 237 under the deferential abuse-of-discretion standard. (*Townsel, supra*, 20 Cal.4th at p. 1097.)

B. Peters’s Petition for Disclosure and Trial Court Ruling

In support of the petition for disclosure in this case, Peters’s counsel submitted a declaration alleging that the following facts were evidence of juror misconduct: (1) the jurors informed the court on the fourth day of deliberations that they had reached a verdict as to Coley but were at an impasse as to Peters, and continued deliberating after the foreperson indicated deliberations might be helpful; (2) when the jurors sent a note to the court asking whether witnesses Richard Eads and Francisco Soto were accomplices within the meaning of the jury instructions, the court responded that it was up to the jury to decide that question; (3) the jurors informed the court they were at an impasse “as to both cases” but sent a follow up note indicating that they were “close” and needed to know whether a unanimous verdict was required on the special allegations; (4) after being advised that unanimity was required, the jury returned verdicts that were “inconsistent,” in that both appellants were convicted of second degree murder in a case where the evidence showed first degree murder, and no firearm enhancement was found true as to Peters, the alleged shooter; and (5) when the jury was polled, Juror No. 10 “hesitated noticeably” before responding.

The court denied the petition: “I don’t find that . . . the defendants have carried their burden to demonstrate a prima facie good cause basis to set a hearing and provide notification to the jurors. [¶] There are a couple [of] reasons. The basic thrust of the motion and even the argument something odd happened, this all concerns the jury’s collective or individual thought processes or deliberative processes, and none of that is admissible under Evidence Code section 1150. [¶] The verdicts are not necessarily inconsistent. They may smack of compromise. It doesn’t mean that anything odd happened. There is no suggestion of outside or undue influence. [¶] There is an

indication that one of the jurors, Juror No. 10, hesitated when he was polled as to one of the verdicts. I think it was, if I read the motion correctly, the verdict as to Mr. Coley, not Mr. Peters. But there is no indication, other than that, that anything odd happened during the taking of the verdict. And juror hesitancy while polling is not uncommon. [¶] There is nothing to indicate that there were any equivocal statements made by Juror No. 10 before he or she indicated it was his verdict. And I just don't find that good cause has been shown as required by the statute."

C. Analysis

The trial court did not abuse its discretion when it concluded that appellants had failed to make the requisite showing of jury misconduct. Appellants suggest it was unusual for the jurors to have reached a verdict after declarations of impasse, but the sequence of events recited in defense counsel's declaration indicates only that the jurors carried out their duty to deliberate and that further deliberations were productive. Nor does a single juror's perceived hesitation in answering the court's post-verdict poll amount to evidence of misconduct during the deliberations; at most, it might suggest a subjective concern on the part of that juror that would not be admissible to challenge the verdict. (Evid. Code, § 1150, subd. (a).)

We do not agree with appellants' suggestion that the jury's verdict of second degree murder rather than first degree murder is consistent with juror misconduct. Though the verdict was perhaps "puzzling" in light of the strong evidence that the shooting was premeditated, it "may show no more than jury lenity, compromise, or mistake" (*People v. Abilez* (2007) 41 Cal.4th 472, 512-513), none of which amounts to misconduct and all of which involve the mental processes of the jurors, which are inadmissible to show misconduct.

We also reject appellants' claim that the verdicts on the firearm enhancements were inconsistent and therefore suggest impropriety on the part of the jury. It is true that the jury hung 11 to 1 in favor of the enhancement allegation as to Peters, the alleged shooter, but found the enhancement true as to Coley, the alleged driver. But this apparent discrepancy can be readily explained as the product of the particular instructions given.

Both appellants were alleged to have violated section 12022.53, which establishes escalating enhancements for the use of a firearm in the commission of enumerated offenses including murder and attempted murder: 10 years under subdivision (b) when the defendant “personally uses a firearm”; 20 years under subdivision (c) when the defendant “personally and intentionally discharges a firearm”; and 25 years to life under subdivision (d) when the defendant “personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice. . . .” Section 12022.53, subdivision (e)(1) additionally allows the enhancement to be imposed for vicarious firearm use in cases where the crimes are gang related: “The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).”

Consistent with section 12022.53, subdivision (e)(1), CALCRIM No. 1402 advised the jury that it could find the enhancement true *as to Coley* if the gang allegation under section 186.22 was proved and “1. Someone who was a principal in the crime personally discharged a firearm during the commission of the crime; [¶] 2. That person intended to discharge the firearm; [¶] AND [¶] That person’s act caused the death or great bodily injury of another person.” But the jury was not given a similar instruction as to Peters, and instead received versions of CALCRIM Nos. 3148 and 3149 that required a finding that Peters *personally* discharged a firearm during the commission of the offenses.

Thus, assuming the holdout juror believed that both Coley and Peters were principals in the murder, but was unsure of the exact role played by each, that juror would have been obliged to reject the firearm allegation as to Peters under the instructions given, even though he or she could have returned a true finding as to Coley under a vicarious use theory. Far from showing juror misconduct, the verdicts on the firearm enhancements suggest the holdout juror gave close attention to the instructions given.

The court did not abuse its discretion when it concluded that appellants had failed to make a prima facie showing of good cause sufficient to support a reasonable belief that any juror committed misconduct. (*People v. Jones* (1998) 17 Cal.4th 279, 317.) The petition for disclosure was properly denied.

IV.

Motion for Self-Representation (Coley)

Appellant Coley argues that the court should have granted his motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S 806 (*Faretta*), which he brought on the day of his sentencing hearing. We reject the claim.

A. Relevant Proceedings

During the trial, Coley was represented by retained counsel, who filed a motion for new trial on his behalf on the ground of inconsistent verdicts. Coley then discharged retained counsel and the court appointed a new attorney to represent him. Appointed counsel obtained a continuance of the sentencing hearing to research a motion for new trial to investigate an alibi defense for Coley, having received a repair receipt showing that Coley's car (the vehicle purportedly used in the shooting) was in the shop when the crime was committed.

At the sentencing hearing that was ultimately held on Coley's case on May 27, 2011,⁸ the court denied the motion for new trial that had been filed by Coley's retained counsel. Coley advised the court that his appointed attorney had decided not to file the motion for new trial based on the potential alibi defense, and requested a continuance so he could file the motion himself. After a recess to allow Coley to confer with appointed counsel, counsel advised the court that Coley was requesting to represent himself for purposes of the new trial motion. The court denied the request: "I'm going to deny the motion for self-representation. I noted that I appointed [appointed counsel] on December 15th of last year. I've continued judgment and sentence a number of times. The last continuance was I think to facilitate further investigation by [appointed counsel]"

⁸ Appellant Peters had been sentenced several months earlier.

pertaining to – I think there was like a car repair order or something that was attached to the motion. A repair order. Apparently that investigation did not pan out.

[¶] [Appointed counsel] is an experienced attorney, criminal defense attorney. I’ve witnessed him try numerous cases. [¶] . . . [¶] . . . [¶] And this just seems untimely to the Court. [¶] There also seems to be a bit of gamesmanship about it, to try to further delay the proceedings. The verdict of the jury was October 28th of last year. [¶] So I just think under all the circumstances that have been presented to the Court that are apparent from the Court’s file, I’m going to deny the motion as untimely.”

B. Discussion

A criminal defendant has a Sixth Amendment right to represent himself at trial. (*Faretta, supra*, 422 U.S. at pp. 807, 835.) In order to invoke this constitutional right, the defendant must make an unequivocal assertion of the right within a reasonable time before the trial begins. (*People v. Skaggs* (1996) 44 Cal.App.4th 1, 5.) If a timely motion to proceed pro se has been made, the trial court “must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be.” (*People v. Dent* (2003) 30 Cal.4th 213, 217.) But when the motion is untimely, self-representation is no longer a matter of right but is subject to the court’s discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) In *People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*) the court set forth the factors that should be considered by a court in exercising this discretion: (1) the defendant’s proclivity to substitute counsel; (2) the quality of counsel’s representation of the defendant; (3) the reasons for the request; (4) the length and stage of the proceedings; and (5) the disruption or delay which might reasonably be expected to follow if the defendant is allowed to represent himself.

Coley argues that although his motion was not brought until the date of the sentencing hearing, it was timely because his appointed counsel had just recently told him he would not be filing a motion for new trial. We disagree. Under the circumstances, and based on the record as it appeared at the time, it was reasonable for the court to conclude that Coley had been given ample time to confer with his appointed counsel and

that his last-minute request for self-representation was a delay tactic. The court carefully considered the factors relevant to the untimely *Faretta* request, including Coley's previous change of counsel, his appointed counsel's experience and competence, the very late state of the proceedings, and the likelihood that the request was being brought for the purpose of delay. Moreover, any error in denying the motion was harmless because the appellate record does not establish that it is reasonably probable Coley could have obtained a better result (an order granting a motion for new trial or a more lenient sentence) had he represented himself. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050-1053 [denial of untimely *Faretta* motion is reviewed under standard for state law error articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

V.

Multiple Punishment for Finding on Gang Allegation (Peters)

Peters argues that the court violated section 654's proscription against multiple punishment by imposing a 10-year gang enhancement on the attempted murder count pursuant to section 186, subdivision (b)(1)(C), as well as a 15-year minimum parole term on the murder under section 186.22, subdivision (b)(5). He submits that his commission of the crimes for the benefit of a criminal street gang was a single act or course of conduct that could only be punished once. (See *People v. Hester* (2000) 22 Cal.4th 290, 294.)

The People respond that section 654 does not apply to multiple acts of violence against different victims (see *People v. Akins* (1997) 56 Cal.App.4th 331, 339), but that in any event, appellant has not been punished twice because he is required to serve 15 years in prison on the second degree murder count regardless of the finding on the gang allegation. We agree that in light of appellant's sentence of 15 years to life on the murder charge, for which he will not earn conduct credits, the section 654 issue is effectively moot. (See *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1238 [application of section 186.22, subdivision (b)(5) does not extend minimum parole date on second degree murder charge].) There has been no double punishment for the true finding on the gang allegation because that finding does not increase the penalty on the murder count.

VI.

Presentence Credits (Coley)

In his opening brief, appellant Coley argued that he was entitled to an award of an additional 828 days of credit for time spent in presentence custody on the murder count. Although the People disputed his entitlement to these credits in the respondent's brief filed August 2, 2012, Coley's reply brief advises us, "On August 14, 2012, the Solano County Superior Court issued an order, with the consent of the Deputy District Attorney and appellant's trial counsel, to make corrections to award the presentence credit based on appellant's opening brief." We consider the issue no further.

VII.

Cumulative Error (Coley)

Appellant Coley argues that the cumulative effect of the errors requires reversal even if they were individually harmless because considered together, they produced an unfair trial. Having found no error, prejudicial or otherwise, we reject the claim.

DISPOSITION

The judgments are affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.